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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CALLAHAN MINING CORPORATION & SUBSIDIARY,
PINNACLE EXPLORATION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,

FRED B. UGAST,
Acting Assistant Attorney General,

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COMMISSIONER OF INTERNAL REVENUE, PETITIONER

CALLAHAN MINING CORPORATION & SUBSIDIARY, PINNACLE EXPLORATION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, but only if the Court should grant the petition in *Callahan Mining Corporation & Subsidiary, Pinnacle Exploration, Inc.* v. *Commissioner*, No. 559, filed August 19, 1970, which involves the same judgment and which we are opposing; if that petition is denied, we shall dismiss this petition.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. (No. 559) App. 14a-43a)[1] are reported at 51 T.C. 1005. The opinion of the court of appeals (Pet. (No. 559) App. 4a-13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1970 (Pet. (No. 559) App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Assuming *arguendo* that, contrary to the ruling of the court of appeals, respondents were entitled to include in their depletion base 50 percent of gross production income, whether respondents were entitled to a net operating loss deduction and a double depletion deduction with regard to an Idaho net profits tax.

STATUTE INVOLVED

Internal Revenue Code of 1954 (68A Stat. 73, 26 U.S.C. (1952 ed., Supp. V)):

> SEC. 172. NET OPERATING LOSS DEDUCTION.
>
> (a) *Deduction Allowed.*—There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2)

[1] "Pet. (No. 559)" references are to the taxpayers' petition for certiorari in *Callahan Mining Corporation & Subsidiary, Pinnacle Exploration, Inc.* v. *Commissioner*, No. 559, pending this Term.

the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

(b) *Net Operating Loss Carrybacks and Carryovers.*—

(1) *Years to which loss may be carried.*—A net operating loss for any taxable year ending after December 31, 1953, shall be—

(A) a net operating loss carryback to each of the 2 taxable years preceding the taxable year of such loss, and

(B) a net operating loss carryover to each of the 5 taxable years following the taxable year of such loss.

(2) *Amount of carrybacks and carryovers.*—Except as provided in subsection (f), the entire amount of the net operating loss for any taxable year (hereinafter in this section referred to as the "loss year") shall be carried to the earliest of the 7 taxable years to which (by reason of subparagraphs (A) and (B) of paragraph (1)) such loss may be carried. The portion of such loss which shall be carried to each of the other 6 taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried. For purposes of the preceding sentence, the taxable income for any such prior taxable year shall be computed—

(A) with the modifications specified in subsection (d) other than paragraphs (1), (4), and (6) thereof; and

graphs (1), (4), and (6) thereof; and

(B) by determining the amount of the net operating loss deduction without regard to the net operating loss for the loss year or for any taxable year thereafter,

and the taxable income so computed shall not be considered to be less than zero.

(c) *Net Operating Loss Defined.*—For purposes of this section, the term "net operating loss" means (for any taxable year ending after December 31, 1953) the excess of the deductions allowed by this chapter over the gross income. * * *

STATEMENT

The salient facts relating to the depletion question raised in respondents' petition for certiorari in *Callahan Mining Corporation & Subsidiary; Pinnacle Exploration, Inc.* v. *Commissioner*, No. 559, this Term, are stated in our brief in opposition in that case, which is filed contemporaneously herewith. Respondents conceded below that, if they prevailed on the depletion question, the adjustments which were the subject of the government's cross appeal from the Tax Court should be made. Having rejected respondents' depletion claim, the court of appeals found it unnecessary to pass on the government's cross appeal.

REASONS FOR GRANTING THE WRIT

This petition is filed to protect the revenue in the event that this Court grants the petition for a writ

of certiorari and reverses in No. 539. If that occurs, then this Court also should grant this petition and remand the case for recomputation of respondents' tax liability based on certain adjustments which respondents do not dispute.

Respondents claimed a net operating loss deduction of $135,145.27 for 1959, the first of the taxable years involved, by way of carry-over from 1954 (R. 19a).[2] Under their theory of the case, they should have included in their depletable mining income for 1958 and 1959, as constructive net profits distributions, one-half of the $500,000 working account accumulated out of net profits. This would increase their 1958 income more than enough to absorb the carry-over from 1954, leaving no carry-over to 1959. If this Court should hold that respondents are entitled to depletion on 50 percent of gross production, then it should also remand the case for recomputation of their tax liability for 1959 in accordance with the provisions and limitations of Section 172 of the Internal Revenue Code, pp. 2-4, *supra*.

Such a holding on the merits would also require a second adjustment, involving elimination of a double depletion allowance on an Idaho net profits tax. The Tax Court has already, by separate ruling, allowed respondents depletion on their share of the state tax. If respondents are entitled to depletion on 50 percent of gross production income, they would automatically

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[2] "R." references are to the printed record in the court of appeals.

be entitled, by reason of such holding, to share in production expense—including the Idaho tax.

CONCLUSION

If this Court should grant the petition for a writ of certiorari in *Callahan Mining Corporation & Subsidiary, Pinnacle Exploration, Inc.* v. *Commissioner*, No. 559, this Term, this petition should also be granted; if certiorari is there denied, we shall dismiss this petition.

Respectfully submitted.

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FRED B. UGAST,
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BENNET N. HOLLANDER,
Attorney.

SEPTEMBER 1970.